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HAROLD B. WILLEY, Clerk

No. 681

IN THE

Supreme Court of the United States

October Term, 1955

SOUTHSIDE VIRGINIA TELECASTING CORPORATION, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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February, 1956.

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Petitioner, Southside Virginia Telecasting Corporation, a Virginia corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on December 29, 1955.

OPINION BELOW

The opinion of the Court of Appeals, printed in Appendix A, hereto, *infra* p. 1a, has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

QUESTION PRESENTED

Whether under Section 402(g) of the Communications Act and Sections 7(c) and 10(e) of the Administrative Procedure Act, which require that agency decisions made

after hearing be based upon substantial evidence on the whole record, the Federal Communications Commission may disregard positive and credited testimony as entitled to no weight.

STATUTES INVOLVED

The pertinent Sections of the Communications Act of 1934, as amended, 66 Stat. 715-20, 47 U.S.C. 309(a), 309(b), 402(b), and 402(g) provide as follows:

> "Sec. 309(a). If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.
>
> "(b) If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. . . . Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining . . . . . Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate . . .
>
> "Sec. 402(b). Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> "(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
>
> * * *
>
> "(g) At the earliest convenient time the court shall hear and determine the appeal upon the record before

it in the manner prescribed by section 10(e) of the Administrative Procedure Act.

The pertinent portion of Section 7(c) of the Administrative Procedure Act, 60 Stat. 241, 5 U.S.C. 1006 provides as follows:

> ". . . no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. . . ."

The pertinent portion of Section 10(e) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009 provides as follows:

> "(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . (b) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; . . . In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

STATEMENT

This petition seeks review of a judgment affirming a decision and order of the Federal Communications Commission which granted the application of Petersburg Television Corporation (Intervenor in the Court below) for a construction permit for a new television station to be located at Petersburg, Virginia and denied the competing application for the same facilities filed by Petitioner.

This decision by the Commission was rendered after a comparative statutory hearing and after an Initial Decision by the Hearing Examiner granting Petitioner's application and denying the application of Petersburg Television Corporation (R. 282-83).[1]

Upon review, on October 1, 1954, the Commission reversed the Hearing Examiner on every determination in favor of Petitioner, rejected the recommendations of its own Broadcast Bureau,[2] and by a vote of three to two, granted the application of Petersburg Television Corporation and denied the application of Petitioner. The dissenting Commissioners voted to affirm the Hearing Examiner's Initial Decision (R. 282; 332).

The main basis of the Commission's decision was its finding that Petitioner's programming proposal involved *the total disregard* of that portion of its service area, located north of Petersburg (R. 303-05). Based on this finding, it concluded that Petersburg Television Corporation should be preferred since its "service philosophy" would be to serve all portions of its service area (R. 322-25; 331).[3]

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[1] The gist of the Examiner's Initial Decision is summarized in Paragraph 10 (R. 268):

> "10. Consideration of the importance of the relative factors of preference between the applicants leads to the conclusion that Southside Virginia Telecasting Corporation gives assurance of a more complete and effective response to the needs of Petersburg than might be expected of Petersburg Television Corporation and that the programs, operating policies, and over-all plans proposed by Southside, and the much greater integration of its personnel into the community, justify the conclusion that Southside Virginia Telecasting Corporation is better qualified to meet the needs of Petersburg and its surrounding area than is Petersburg Television Corporation."

[2] The Broadcast Bureau supported the Hearing Examiner's ultimate decision that Petitioner was to be preferred (R. 269-78; 282-83).

[3] The decision was also based on other secondary grounds not involved in this Petition for Certiorari.

The crucial finding that Petitioner would totally disregard the northern portion of its service area was made in the face of express and positive testimony by Petitioner's President, majority stockholder, and witness-in-chief (Louis Peterson) that Petitioner's proposal was to emphasize service to Petersburg and the southern portion of its service area and to treat the northern portion on a secondary basis (R. 88; 107; 117; 303-05).[4] The Commission held nevertheless that the "record does not support Peterson's assertions" and that "on the face of the record, we cannot attach weight to Peterson's general profession on this score" (R. 305). Other testimony by Peterson, further corroborating the testimony afforded no weight by the Commission, was not even considered: that the past programming of Radio Station WSSV upon which Petitioner's television programming was based did not disregard the north;[5] that the specific program proposals of Petitioner established it would serve the interests of the north;[6] that Petitioner would sell advertising in the northern part of its service area.[7]

The testimony of Peterson which was disregarded as having no weight was fully credited; Peterson's credibility was fully accepted by the Commission (R. 289; 290; 327-28). The Commission held:

> "The picture presented to us leaves no doubt of an excellent operation in the public interest. We there-

[4] The Commission made clear that if this testimony had been accepted, the ultimate decision would have been materially affected (R. 324-25).

[5] R. 77-80; 82-86; 97-101; 195-96; 247; 274.

[6] R. 93; 95; 97-98; 106-10; 116-21; 200-210; 215-16; 310; 318-19. Examples of specific testimony disregarded by the Commission were that live talent from the northern portion of the service area would be presented (R. 121) and announcements would be made in behalf of churches located in the northern portion of the service area (R. 92).

[7] R. 102-04 312-13.

> fore find that the parties can be relied upon to carry out their proposals and to be sensitive to the needs and desires of the areas *which they have stated are of concern to them.* In this connection, we note that several of the programs proposed to be carried over the applicant's television station are already features of the AM operations." (R. 328) (Emphasis supplied)

Moreover, Peterson was a witness who could testify in behalf of Petitioner with knowledge and authority. Peterson was the moving force behind Petitioner's application; he personally prepared the program proposal and he would be responsible for its execution as majority stockholder and General Manager of the station (R. 289-290). He would devote 80 to 85% of his total time to the management of the station on a day-to-day basis (*Ibid*). He was a witness who had knowledge of Petitioner's program proposal, authority to make representations concerning them, and power and authority to carry them out.

The sole basis of the Commission's determination that the credited and positive testimony of Peterson would be given no weight was the negative inference it drew from the fact that Petitioner had made no "contacts" in the area north of Petersburg (R. 304). This evidence was not inconsistent with Peterson's testimony in any way. On the basis of the negative inference, and without giving any consideration to the reasons why such contacts were not made, it disregarded all the unimpeached testimony of Peterson just as if it had not been put in evidence.

After a Petition for Rehearing, Reconsideration and Re-Argument was denied (R. 336-42),[8] Petitioner filed an appeal in the United States Court of Appeals for the District of Columbia Circuit (R. 2-3). On December 29, 1955,

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[8] Three of the members constituted the original majority; the fourth was a dissenter who felt there should be no further review of the original decision but who did not change his original dissent. A majority of the whole Commission has never voted for the decision on the merits at any time.

that Court, in a *per curiam* opinion, affirmed the action of the Commission holding that the Commission had not "acted arbitrarily in choosing between the applicants" (Appendix A, p. 1b). Despite the nature of the opinion, it is clear that the Court decided that the Commission's determination to give no weight to Peterson's credited testimony was not arbitrary. This conclusion is inescapable since the Commission conceded before the Court of Appeals that the disregarded testimony had been afforded "no weight"; it argued that the determination that the "general professions regarding programming were entitled to no weight was entirely reasonable". Brief of Federal Communications Commission in Court below, page 8.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below conflicts with decisions of this Court and decisions of the Courts of Appeal for the Fifth, Sixth, Seventh and Eighth Circuits, to wit: *Dickinson* v. *United States,* 346 U.S. 389; *Kansas City So. Ry. Co.* v. *C. H. Albers Commission Co.,* 223 U.S. 573, 595-96; *NLRB* v. *Tex-O-Kan Flour Mills,* 122 F. 2d 433 (C.A. 5); *NLRB* v. *Ohio Calcium Co.,* 133 F. 2d 721 (C.A. 6); *NLRB* v. *Sheboygan Chair Co.,* 125 F.2d 436 (C.A. 7); *American Smelting and Refining Co.* v. *NLRB,* 126 F.2d 680, 688 (C.A. 8).

It is a firmly established principle of law that uncontradicted testimony or evidence fully credited and worthy of belief cannot be totally disregarded by a fact finder as entitled to no weight whatsoever. *Dickinson* v. *United States,* 346 U.S. 389; *Kansas City So. Ry. Co.* v. *C. H. Albers Commission Co.,* 223 U.S. 573; see 7 WIGMORE, EVIDENCE, Section 2034; 9 WIGMORE, EVIDENCE, Section 2495.

This principle has been consistently applied to administrative decisions rendered after a statutory hearing.

In *NLRB* v. *Tex-O-Kan Flour Mills,* 122 F.2d 433 (C.A. 5), the Court held that the testimony under oath of one who has knowledge cannot be disregarded in the absence of impeachment or substantial contradiction, "or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point." 122 F.2d at 439. The holding in *American Smelting and Refining Co.* v. *NLRB,* 126 F.2d 680, 688 (C.A. 8) is identical. Likewise, in *NLRB* v. *Sheboygan Chair Co.,* 125 F.2d 436 (C.A. 7), Judge Minton reaffirmed the basic principle that an administrative agency is not justified in disregarding evidence when it is given by "honorable men, wholly unimpeached, testifying under oath", and the testimony is consistent with other evidence. In that case, as here, the Labor Board disregarded the Examiner's findings and his report. Judge Minton went on to hold, "The Board should not discard the positive creditable testimony of witnesses in favor of an inference drawn from tenuous circumstances that at best could have supported only an anemic suspicion. Such an inference does not meet the test of substantial evidence," 125 F.2d at 439. See also *NLRB* v. *Ohio Calcium Co.,* 133 F.2d 721 (C.A. 6).

It must be emphasized that this is not a case in which the Commission has refused to follow its Hearing Examiner in crediting testimony. See, *e.g., NLRB* v. *Pyne Molding Corporation,* 226 F.2d 818 (C.A. 2). Like the Hearing Examiner who credited the testimony and rendered a decision in favor of Petitioner, the Commission itself also credited the testimony, going out of its way to determine expressly that it could rely on Peterson and Petitioner to carry out Petitioner's proposal and to be sensitive to the needs and desires of the areas which Peterson stated would be of concern to him (R. 328). As a matter of fact, not only did both the Examiner and the Commission credit the testimony involved, but the other parties to the proceedings, Petersburg Television Corporation and the Broadcast Bureau also both expressly

credited the specific testimony disregarded by the Commission without any weight. (R. 117; 247-48; 272; 274-75; 280). The decision of the Court below was therefore especially erroneous since, under the decision of this Court in *Universal Camera Corporation* v. *NLRB,* 340 U.S. 474, such matters are relevant to the determination whether the Commission's findings are substantially supported in accordance with law. *Cf. United States* v. *Interstate Commerce Commission,* 91 App. D.C. 178, 183, 198 F.2d 958, 963, *cert. den.*, 344 U.S. 893; *Wyman Gordon Co.* v. *NLRB,* 153 F.2d 480, 493 (C.A. 7); *NLRB* v. *Ohio Calcium Co.,* 133 F.2d 721 (C.A. 6). The uncontradicted evidence here was plausible and was fully supported by the other evidence in the record, disregarded by the Commission. Most important, it came from a witness whom the Commission recognized could be relied upon to fulfill his representations. Under these circumstances, the decision of the Court below that the Commission had the power to disregard this testimony as without weight is clearly erroneous and in conflict with the well-settled principles enunciated in the cases cited above.

2. The decision below is erroneous and presents a square conflict of decisions on a question of importance to the many persons who come before the Federal Communications Commission as applicants for radio and television stations. Such persons are entitled to the same treatment as other persons affected by the administrative process. Yet because the appellate provisions of the Communications Act (Section 402) provided that the Circuit Court of Appeals for the District of Columbia shall have exclusive jurisdiction over appeals involving applications for broadcast licenses, such persons will be placed in a position where their positive, credited, and plausible testimony may be disregarded as without weight by the Federal Communications Commission even though other administrative agencies, whose decisions are reviewed by other courts, would not be permitted to take the same action.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Certiorari should be granted.

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February 9, 1956.